No. 15-7

In the Supreme Court of the United States

UNIVERSAL HEALTH SERVICES, INC., PETITIONER

v.

UNITED STATES AND MASSACHUSETTS EX REL. JULIO ESCOBAR AND CARMEN CORREA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a health services provider that requests payment from the government for providing psychiatric services, knowing but not disclosing that those services failed to meet requirements that were material to payment, has presented a "false or fraudulent claim for payment" under the False Claims Act, 31 U.S.C. 3729(a)(1)(A).

2. Whether such a claim for payment may be "false or fraudulent" even if the requirements that the provider violated were not expressly designated as conditions of payment.

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INTEREST OF THE UNITED STATES

The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, is "used as the primary vehicle by the Government for recouping losses suffered through fraud." H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986). The United States therefore has a substantial interest in the proper interpretation of the Act.

STATEMENT

1. Congress enacted the FCA "in 1863 with the principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (brackets and internal quotation marks omitted). Since that time, the FCA "has been used more than any other

[statute] in defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 4 (1986) (Senate Report).

a. The FCA imposes civil liability for a variety of deceptive practices involving government funds and property. *Inter alia*, the Act renders liable any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A); and any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729(a)(1)(B).[1] The FCA defines the term "claim" to include requests for money "made to a contractor, grantee, or other recipient" of federal funds "if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest." 31 U.S.C. 3729(b)(2)(A)(ii).

A person who violates the FCA is liable to the United States for civil penalties plus three times the amount of the government's damages. 31 U.S.C. 3729(a). Suits to collect those penalties and damages may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a qui tam action. 31 U.S.C. 3730(a) and (b)(1). If a

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[1] The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617, modified and renumbered the subsections of 31 U.S.C. 3729(a). § 4, 123 Stat. 1621. Although this case involves at least some claims submitted prior to 2009, the parties have assumed that the amended provisions of the FCA apply. See, *e.g.*, Pet. Br. 5. This brief similarly refers to the amended version, which does not differ from its predecessor in any way relevant to this case.

qui tam action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

b. Medicaid is a jointly funded federal-state program that provides health care to needy individuals. See 42 U.S.C. 1396-1396w-5. "Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015). Medicaid is administered at the federal level by the Centers for Medicare and Medicaid Services (CMS). Within broad federal rules, and subject to supervision by CMS, each State determines its own eligibility criteria for beneficiaries, the types and range of services that are covered, payment levels for various services, and administrative and operating procedures. 42 C.F.R. 430.0.

Providers of health services under Medicaid submit claims for payment directly to the State, which pays the claims and obtains the federal portion of the payments from accounts that draw on the United States Treasury. After the end of each calendar quarter, the State submits to CMS a final expenditure report, which allows adjustment to the quarterly federal funding amount to reconcile the estimated and actual expenditures. 42 C.F.R. 430.0 and 430.30. In this way, the States act as gatekeepers for both federal and state Medicaid expenditures.

To qualify for federal funds, each participating State must submit to CMS a "plan for medical assistance" that details the nature and scope of the State's Medicaid program and demonstrates its compliance with the Medicaid Act. 42 U.S.C. 1396a(a); 42 C.F.R.

430.10. In accordance with that process, the Commonwealth of Massachusetts has promulgated regulations governing its Medicaid program, which is known as MassHealth. Pet. App. 3.

Chapter 429 of the MassHealth regulations, see 130 Mass. Code Regs. §§ 429.000 *et seq.*, establishes comprehensive requirements concerning the nature, scope, and quality of mental health services to be provided both at "parent centers" and at "satellite facilities" operating under the license and administration of a parent center. *Id.* § 429.402. *Inter alia*, mental health centers must employ three or more "core professional" staff members, at least one of whom "must be a psychiatrist," who are properly qualified and trained to treat mental health conditions. *Id.* § 429.422(A); see *id.* § 429.424(A)(1) (psychiatrist "must either currently be certified" by one of two national licensing boards or "be eligible and applying for such certification"). Other staff members must be adequately supervised by qualified staff with appropriate training. See *id.* § 429.422(D); *id.* § 429.423(C) and (D)(2)(f); *id.* § 429.438(E); see also *id.* § 429.424 ("Qualifications of Professional Staff Members Authorized to Render Billable Mental Health Center Services by Core Discipline"). All mental health centers must designate a "clinical director," who is "responsible * * * for the direction and control of all professional staff members and services." *Id.* § 429.423(B). Clinical directors must ensure appropriate staffing and supervision at all facilities, including satellite facilities. *Id.* § 429.423(B)(2).

The MassHealth regulations condition the reimbursement of claims for mental health services on compliance with the training and supervision re-

quirements established in the regulations. Section 429.439 states that "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards" described in the subsections of that provision. Another regulation states that "MassHealth * * * pays for diagnostic and treatment services only when a professional staff member, as defined by [Section] 429.424, personally provides these services." 130 Mass. Code Regs. § 429.441(A). The regulations thus make clear that adequate staffing, training, and supervision of mental health care providers are prerequisites to government reimbursement of Medicaid claims.

2. Petitioner Universal Health Services, Inc. receives "Medicaid revenues in excess of $90 million annually" for medical services provided in Massachusetts.[2] Petitioner owns and operates a number of mental health care facilities, including Arbour Counseling Services in Lawrence, Massachusetts. Arbour is a "satellite facility" within the meaning of the MassHealth regulations. See 130 Mass. Code Regs. § 429.402 (defining satellite facility).

Yarushka Rivera was a teenage recipient of MassHealth benefits who received mental health counseling services at Arbour beginning in 2007. Pet. App. 4-5. Rivera was initially assigned to two different counselors, neither of whom had the requisite licenses to provide mental health care. *Id.* at 5. After

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[2] See Universal Health Servs., Inc., Quarterly Report (10-Q) (Aug. 7, 2015), http://ir.uhsinc.com/phoenix.zhtml?c=105817&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTEwNDIxNzA1JkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVElPTl9FTlRJUkUmc3Vic2lkPTU3.

her parents became concerned that the clinical director at Arbour, Edward Keohan, was not adequately supervising those two counselors, Rivera was transferred to a different therapist, Anna Fuchu, who "held herself out as a psychologist with a Ph.D." *Ibid.* It was later revealed, however, that Fuchu had "trained at an unaccredited online school" and that her application for a professional license had been rejected. *Ibid.* Despite lacking required credentials, Fuchu treated Rivera and diagnosed her with bipolar disorder. *Ibid.*

In May 2009, Rivera's behavioral problems worsened, and officials at her school informed her that she would be allowed to attend classes only if she saw a psychiatrist. Fuchu referred Rivera to Maribel Ortiz, another staff member at Arbour. It was later revealed that Ortiz, like Fuchu, was neither board-certified nor supervised by a licensed psychiatrist at Arbour. To treat Rivera, Ortiz prescribed an anti-seizure medication commonly known as Trileptal. Rivera soon experienced an adverse reaction to the medication, and on May 13 she had a seizure and was hospitalized. Rivera resumed treatment at Arbour, but in October she suffered another seizure and died. Rivera's parents subsequently filed administrative complaints with several state agencies, and the Massachusetts Department of Public Health determined that Arbour had violated a variety of regulations regarding staff supervision and licensure. Pet. App. 5-7.

3. In 2013, Rivera's parents (respondents here) filed a qui tam suit against petitioner under the Massachusetts False Claims Act and the federal FCA. They alleged that petitioner had requested payment for mental health services despite knowing that its operations failed to comply with a variety of licensure

and supervision requirements. The United States and the Commonwealth of Massachusetts declined to intervene in the suit. Pet. App. 8-9 & n.8.

a. The district court dismissed the complaint. Pet. App. 25-53. The court found that most of the regulatory requirements that petitioner was alleged to have violated were not "preconditions to payment" but instead merely "establishe[d] requirements for *participation* of mental health centers in MassHealth." *Id.* at 39 (citation omitted). The court further held that, although the "plain provisions [of Section 429.439] indicate that it is a condition of payment," respondents had failed to plead with particularity a misrepresentation of compliance with any of the standards enumerated or cross-referenced in that provision. *Id.* at 43-44 (internal quotation marks omitted).

b. The court of appeals reversed and remanded. Pet. App. 1-24. The court explained that, to determine whether petitioner's alleged conduct could give rise to FCA liability, "[w]e ask simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." *Id.* at 13. The court next addressed the distinction drawn by the district court "between conditions of participation and conditions of payment." *Id.* at 14. The court concluded that, because the relevant MassHealth regulations "clearly impose conditions of payment," it was unnecessary to decide whether (as the district court had held) "*only* claims premised on misrepresentation of compliance with a condition of payment are cognizable under the FCA." *Id.* at 15.

The court of appeals held that respondents' complaint had adequately alleged violations of the FCA.

Pet. App. 15-23. The court explained that the relevant MassHealth regulations "explicitly condition the reimbursement of satellites' claims on the clinical director's fulfillment of his or her regulatory duties," including the duty to "ensur[e] appropriate supervision." *Id.* at 16; see *ibid.* ("Indeed, the cost of staff supervision is automatically built into MassHealth reimbursement rates."). At its "core," the court observed, respondents' complaint alleged "[t]hat supervision at Arbour was either grossly inadequate or entirely lacking." *Ibid.* The court concluded that, because petitioner's requests for payment had allegedly "misrepresented compliance with a condition of payment, i.e., proper supervision," respondents had adequately alleged that those payment requests "were false within the meaning of the Act." *Id.* at 17. For similar reasons, the court held that respondents had adequately alleged other fraudulent misrepresentations concerning petitioner's staffing and supervisory practices. *Id.* at 20-23.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that a claim for government funds may be "false or fraudulent" within the meaning of the FCA even if no express falsehood appears on the face of the claim itself.

A. 1. By requesting MassHealth payments, petitioner represented that it was legally entitled to the requested funds. When a claimant explicitly or implicitly represents that it has given the government the benefit of its bargain—*i.e.*, that the claimant has satisfied all material contractual or legal requirements—it can be held liable under the FCA if it knows that representation to be untrue.

2. Contrary to petitioner's contention, liability for fraud has not traditionally been limited to persons who utilize explicit false statements to cheat their victims. Under the common law, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." 3 Restatement (Second) of Torts § 529, at 62 (1977) (Restatement). There is no sound textual, historical, or practical reason to give a narrower reading to the term "false or fraudulent claim" in the FCA.

3. The court of appeals' decision is consistent with the purposes for which the FCA was enacted and the circumstances in which it historically has been applied. Congress enacted the FCA during the Civil War when military contractors charged the government in full for goods and services that fell short of army specifications. When Congress overhauled the Act in 1986, the Senate Report explained that, when payment is requested for goods and services "provided in violation of contract terms, specification, statute or regulation," such a request is a "false claim." Senate Report 9. This Court has previously upheld FCA liability in cases where payment was requested for goods or services that failed to meet requirements, but no express falsehood appeared on the face of the claim itself.

4. Federal funds are often disbursed through a sequential process, in which the would-be recipient first obtains a government contract or secures participation in a federal program, and then submits periodic requests for payment as it delivers goods or performs services. Whether or not each periodic payment re-

quest explicitly reaffirms that the material conditions of payment continue to be satisfied, the government is entitled to treat the request itself as an implicit representation to that effect.

B. Petitioner's policy-based arguments provide no sound basis for a contrary rule. Depending on precisely how it was implemented, a rule making an explicit falsehood a prerequisite to FCA liability would be either pointless, burdensome, or counterproductive. Petitioner argues that an express certification provides clear notice to a potential claimant about which requirements he must satisfy before requesting payment from the government. But the FCA's scienter and materiality requirements, see 31 U.S.C. 3729(b)(1) and (4), protect claimants who act negligently or who rely in good faith on an objectively reasonable interpretation of a contractual or legal duty.

II. Petitioner's alternative argument—that an implied misrepresentation can serve as the basis for FCA liability only if it concerns a matter that is expressly identified as a condition of payment—is similarly without merit.

A. The MassHealth regulations expressly condition payment for mental health services on compliance with staffing and supervision requirements. See 130 Mass. Code Regs. § 429.439; *id.* § 429.441(A). Petitioner therefore would not be entitled to dismissal of respondents' complaint even if its proposed fallback rule were adopted.

B. In any event, petitioners' proposed distinction has no basis in the statutory text or in the common-law rules governing the tort of fraudulent misrepresentation. Under the common law, a speaker's liabil-

ity for misleading partial disclosures depends on "whether the person making the statement knows or believes that the undisclosed facts might affect the recipient's conduct in the transaction at hand." Restatement § 529 cmt. b, at 63. Similarly under the FCA, a defendant can be held liable only if its misrepresentation (whether explicit or implicit) is material to the government's payment decision; and the Act defines the term "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. 3729(b)(4). But a failure to comply with particular requirements may clearly be "material" to the government's payment decision even if no provision of law or contract states explicitly that a denial of federal funds will be the consequence of non-compliance.

C. Petitioner asserts that advance identification of particular requirements as conditions of payment is necessary to provide constitutionally adequate notice to potential claimants. But courts have long applied common-law principles to determine whether a speaker's partial disclosure is materially misleading because the speaker has failed to disclose facts that are inconsistent with the impression conveyed. There is nothing "patently unfair" or "constitutionally suspect" (Pet. Br. 47) about imposing liability on a claimant who requests payment from the government despite knowing that it has violated a material requirement.

III. The complaint in this case adequately pleaded that petitioner had submitted "false or fraudulent" claims for payment. The complaint alleged that petitioner had requested payment knowing, but not disclosing, that the services it had provided did not satisfy MassHealth requirements concerning staffing and

supervision at mental health facilities. If respondents can prove those allegations, and can prove that the violated requirements were "material," then liability under the FCA would be proper.

ARGUMENT

The FCA was designed to "reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). The common law has long condemned, as a form of actionable fraud, efforts to mislead commercial counter-parties through the use of literally accurate but misleading partial disclosures. Nothing in the FCA's text or history suggests that Congress intended to insulate this long-recognized form of fraud from the strictures of the Act. Petitioner's fallback argument, under which implicit misrepresentations can give rise to FCA liability only if they concern a matter that is expressly designated as a condition of payment, likewise has no grounding in the statutory text or in relevant background principles.

I. A CLAIM FOR PAYMENT MAY BE "FALSE OR FRAUDULENT" UNDER THE FCA EVEN IF THE REQUEST FOR PAYMENT ITSELF DOES NOT CONTAIN AN EXPLICIT FALSEHOOD.

The FCA "reach[es] all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." Senate Report 9. When a claimant requests payment in full from the government, he declares his entitlement to the funds and implicitly represents that all material contractual or legal requirements have been satisfied. If that repre-

sentation is untrue, then the request for payment is a "false or fraudulent claim."

A. The FCA's Text, History, And Purposes Confirm That A Claim For Payment May Be "False or Fraudulent" If It Fails To Disclose The Claimant's Non-compliance With Legal Or Contractual Requirements.

1. In its current form, the FCA applies to "any person who * * * knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1)(A). The Act defines the term "claim" to include any request for money "made to a contractor, grantee, or other recipient" of federal funds "if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest." 31 U.S.C. 3729(b)(2)(A)(ii). Petitioner does not dispute that, if a claim for payment explicitly represents that all legal or contractual requirements have been satisfied, when the claimant knows that he is actually in breach of some material payment condition, the claimant can be held liable under the FCA.

Although a request for payment that contains explicit falsehoods is one type of "false or fraudulent claim," it is not the only type. A request may likewise be "false or fraudulent" if the claimant knows that legal or contractual requirements have not been met but seeks payment from the government without disclosing that fact. See *Webster's Third New International Dictionary* 819 (1981) (defining "false" as "not true," "deceitful," "tending to mislead"); *id.* at 904 (defining "fraud" to include "an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another in reliance upon it to part with some valuable thing"). Thus, if "a company con-

tracts with the government to supply gasoline with an octane rating of ninety-one or higher," but the contractor "knowingly supplies gasoline that has an octane rating of only eighty-seven and fails to disclose this discrepancy to the government," its requests for payment will violate the FCA even if those requests are made on "pre-printed monthly invoice forms" that "specify the amount of gasoline supplied during the month but nowhere require it to certify that the gasoline is at least ninety-one octane." *United States* v. *Science Application Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) (*SAIC*).

The structure of the FCA confirms that a claim may be "false or fraudulent" even if it contains no express untruth. Unlike Section 3729(a)(1)(B), which applies where a person makes or uses "a false record or statement material to a false or fraudulent claim," Section 3729(a)(1)(A) does not require a "false record or statement," let alone an *express* false statement on the face of a claim for payment. The contrast between those two provisions reinforces the conclusion that a claim may be "false or fraudulent" under Section 3729(a)(1)(A) even where it contains no express false statements. See *Shaw* v. *AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000). Cf. *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (declining to read presentment requirement specified in former Section 3729(a)(1) into former Section 3729(a)(2), which did not contain such requirement).

Courts have sometimes described a claim of this nature as an "implied" false claim or as an "implied certification" of compliance with the contract's requirements. See, *e.g.*, *SAIC*, 626 F.3d at 1269. By

requesting payment from the government, the claimant implies that it has held up its own end of the deal—a representation that is false if in fact it has not done so. The lower courts have accordingly held claimants liable under the FCA where they have requested payment from the government for goods or services despite knowing that "the Government [will] not get what it bargained for." *United States ex rel. Wilkins* v. *United Health Grp., Inc.*, 659 F.3d 295, 314 (3d Cir. 2011) (citation and brackets omitted); see Pet. App. 11-13 (1st Cir.); *Mikes* v. *Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *Wilkins*, 659 F.3d at 306 (3d Cir.); *United States ex rel. Badr* v. *Triple Canopy, Inc.*, 775 F.3d 628, 635-636 (4th Cir. 2015), petition for cert. pending, No. 14-1440 (filed June 5, 2015); *United States ex rel. Augustine* v. *Century Health Servs., Inc.*, 289 F.3d 409, 414-415 (6th Cir. 2002); *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 996-998 (9th Cir.), cert. denied, 562 U.S. 1102 (2010); *United States ex rel. Conner* v. *Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *SAIC*, 626 F.3d at 1268-1270 (D.C. Cir.); see also *United States ex rel. Osheroff* v. *Humana, Inc.*, 776 F.3d 805, 808 n.1 (11th Cir. 2015) (reserving judgment); *United States ex rel. Absher* v. *Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 711 & n.13 (7th Cir. 2014) (same); *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010) (same).[3]

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[3] Until recently, no court of appeals had rejected the proposition that a claim may be "false or fraudulent" within the meaning of the FCA even though no explicit false statement appears on the face of the claim. In *United States* v. *Sanford-Brown, Ltd.*, 788 F.3d 696 (2015), petition for cert. pending, No. 15-729 (filed Dec. 2, 2015), the Seventh Circuit stated that, "[a]lthough a number of other

2. Although Congress did not define the terms "false" and "fraudulent" in the FCA, "[i]t is * * * well established that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989) (brackets, alteration, citation, and internal quotation marks omitted); see *Field* v. *Mans*, 516 U.S. 59, 69 (1995) (statutory terms drawn from the common law "carry the acquired meaning of terms of art"). A variety of common-law concepts reflect the understanding that a statement may be "false or fraudulent" if it omits information necessary to keep it from being misleading, even if the statement itself contains no express untruths.

Under the tort of fraudulent misrepresentation, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." Restatement § 529, at 62. The same concept applies when fraud is asserted as a defense to a con-

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circuits have adopted th[e] so-called doctrine of implied false certification, we decline to join them and instead join the Fifth Circuit. *See U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010)." *Id.* at 711-712 (citation and footnote omitted). The remainder of the court's Section 3729(a)(1)(A) analysis, however, focused entirely on the specific statutory context in which the allegedly false claims were submitted. See *id.* at 709-712. In addition, the Seventh Circuit stated that it would "join the Fifth Circuit," *id.* at 712 (citing *Steury*); but the Fifth Circuit had reserved judgment on the implied-certification theory rather than rejecting it, see *Steury*, 625 F.3d at 268.

tract claim, see *Junius Constr. Co.* v. *Cohen*, 178 N.E. 672, 674 (N.Y. 1931) (Cardozo, J.) (declining to order specific performance of contract based on implicit misrepresentation "that went to the very essence of the bargain"), and for purposes of the common-law crime of false pretenses, see 2 Francis Wharton, *A Treatise on Criminal Law* § 1170, at 90 n.2 (8th ed. 1880) ("He who enters into a bargain of any kind implies * * * the existence of the conditions on which the other party depended when entering into the transaction."); *id.* at 91 n.2 ("The grocer who delivers a package to a purchaser calling for a pound of coffee implies that the package contains the article called for, in the required quantity."). Judicial references to the "implied certification" theory of FCA liability are best understood as shorthand for the established principle that a communication can be materially misleading, and can give rise to liability for fraudulent misrepresentation if the requisite scienter is established, even though it contains no explicit false statement.[4]

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[4] In certain limited respects, the FCA's text reflects clear congressional intent to depart from the common-law principles that have historically governed suits alleging fraud. Because the Act prohibits the knowing *presentment* of a "false or fraudulent claim," 31 U.S.C. 3729(a)(1)(A), an FCA plaintiff need not prove the traditional elements of reliance and damages. Cf. *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (explaining that, because the mail, wire, and bank fraud statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted"). And by defining the terms "knowing" and "knowingly" to include "deliberate ignorance" or "reckless disregard of the truth or falsity of [particular] information," 31 U.S.C. 3729(b)(1)(A)(ii) and (iii), the FCA makes it irrelevant whether

Petitioner recognizes that "[t]he FCA's prohibition on 'fraudulent' claims is * * * defined by common legal understanding," Br. 30, but its argument misapprehends the scope of common-law fraud. Petitioner relies (Br. 31) on the "principle that, 'when an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.'" But cases like this one, and others in which courts have treated implied misrepresentations as appropriate grounds for FCA liability, do not involve nondisclosure standing alone. Every claim for payment constitutes the claimant's affirmative representation that it is entitled to be paid. Many requests for payment also recite additional information (*e.g.*, the quantity of gasoline delivered in the hypothetical discussed in *SAIC*, see p. 14, *supra*) that, while literally accurate, may be misleading if other information is concealed. Those affirmative representations trigger the corollary principle that, "if the defendant does speak, he must disclose enough to prevent his words from being misleading." *Prosser and Keeton on the Law of Torts* § 106, at 738 (5th ed. 1984) (*Prosser & Keeton*).

A leading case is *Junius Construction*, *supra*, in which a buyer contracted to purchase a parcel of land in New York City, and the seller disclosed a list of potential street-openings that might have affected the property's boundaries. 178 N.E. at 672. The seller failed to disclose, however, information about an additional street-opening that "would cut the plot substan-

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deliberate ignorance or recklessness would be a sufficiently culpable mental state to support liability for common-law fraud. Cf. Resp. Br. 27. Nothing in the FCA's text, however, suggests that Congress intended to depart from the established understanding that implicit misrepresentations can constitute actionable fraud.

tially in half." *Ibid.* Justice Cardozo, writing for the New York Court of Appeals, concluded "that there was misrepresentation by the seller as to the situation of the land and the contingencies affecting the right to use it." *Id.* at 674. The court recognized that the seller was under no "duty to mention the projected streets at all." *Ibid.* The court held, however, that "having undertaken or professed to mention them, he could not fairly stop halfway, listing those that were unimportant and keeping silent as to the other." *Ibid.* The court explained that "the enumeration of two streets, described as unopened but projected, was a tacit representation that the land to be conveyed was subject to no others." *Ibid.* By disclosing only part of the truth, the seller had made a "[m]isrepresentation" that "went to the very essence of the bargain." *Ibid.*

This Court and others have applied that principle in a wide variety of cases and contexts. See, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1321 (2011) (explaining that, although SEC Rule 10b-5 "do[es] not create an affirmative duty to disclose," disclosure may be "necessary to make statements made, in light of the circumstances under which they were made, not misleading") (ellipsis and internal quotation marks omitted); *Tietsworth* v. *Harley-Davidson, Inc.*, 677 N.W.2d 233, 256 (Wis. 2004) ("If a seller speaks, its words must be sufficient so as not to be misleading."); *Kronfeld* v. *Missal*, 89 A. 95, 96 (Conn. 1913) ("If a person * * * places himself in a position where his silence will convey a false impression of the truth, there may be as much fraud as in a false statement."). More generally, the Court has observed that, at common law, the "concealment," *Neder* v. *United States*, 527 U.S. 1, 22 (1999), or

"omission," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996), of a material fact could constitute actionable fraud. In law as in life, "half of the truth may obviously amount to a lie, if it is understood to be the whole." *Prosser & Keeton* § 106, at 738.

3. Nothing in the FCA's history or purposes suggests that Congress intended to exempt from liability the sorts of implicit misrepresentations that have traditionally been viewed as fraudulent. When Congress first drafted the FCA in 1863, the Act's proponents explained that it would enlist private attorneys general "to assist in ferreting out unscrupulous defense contractors who committed fraud against the Union Army," for example, "by delivering bullets loaded with sawdust." Joan R. Bullock, *The Pebble in the Shoe: Making the Case for the Government Employee*, 60 Tenn. L. Rev. 365, 368-369 (1993) (citing Cong. Globe, 37th Cong., 3d Sess. 952, 955 (1863)). Petitioner's argument logically implies that, unless such a contractor stated explicitly that its bullets were of adequate quality, it could not be held liable under the FCA even if it requested payment for goods that it knew to be grossly substandard.

Congress amended the FCA in 1986 in order to strengthen the statute and broaden its reach. See Senate Report 2-8. In explaining the Act's goals, the Senate Report accompanying the amendments emphasized Congress's intent "to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services." *Id.* at 9. The report further explained that "a false claim may take many forms, the most common being a claim for goods or services not provided, *or provided in violation of contract terms, specification, statute or regu-*

lation." *Ibid.* (emphasis added). That description focuses on the discrepancy between what the law or contract requires and what the claimant provides, not on the presence or absence of an explicit false representation.[5]

This Court has upheld liability under the FCA even in circumstances where no express falsehood appeared on the claim for payment. In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), electrical contractors were hired for Public Works Administration projects, and the contractors colluded to bid up the cost of the work. *Id.* at 539. Although the contractors had been hired for the projects by local governments, "[a] large portion of the money paid [to them] under these contracts was federal in origin." *Id.* at 542-543. This Court concluded that the scheme fell "well within the prohibition of the [FCA]" because "[t]he government's money would never have been placed in the joint fund for payment to [the contractors] had its agents known the bids were collusive."

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[5] Petitioner describes (Br. 37-38) the 1986 Senate Report as endorsing only the proposition that a claimant may violate the FCA if it knowingly bills the government for "worthless" goods or services. But the Senate Report did not refer to "worthless" goods and services; it referred to goods and services "provided in violation of contract terms, specification, statute or regulation." Senate Report 9. In any event, the imposition of FCA liability in cases involving "worthless" goods or services rests on the understanding that, by submitting a claim for payment, the claimant impliedly represents that the goods or services are of *some* value to the government. If that is a sound basis for FCA liability, there is no logical reason to reach a different result when the claimant's goods or services have some value but the claimant knows, and fails to disclose, that those goods or services fall short of applicable requirements.

Ibid. And while the Court stated that "many if not most of the respondents certified that their bids were 'genuine and not sham or collusive,'" it did not distinguish for liability purposes between the contractors that had made such certifications and those that had not. *Id.* at 543.

In *United States* v. *Bornstein*, 423 U.S. 303 (1976), a subcontractor was held liable under the FCA after it provided electron tubes that "were not of the required quality" to a prime contractor, which then incorporated the tubes into radio kits that it furnished to the government. *Id.* at 307. The Court held that, when the prime contractor requested payment for the substandard kits, the subcontractor became liable for "caus[ing] false claims to be submitted to the United States." *Id.* at 311. Having contracted to provide radio kits with electron tubes of one type, the prime subcontractor had submitted false claims (albeit unwittingly) by requesting full payment for kits with deficient tubes. *Ibid.*

Petitioner seeks (Br. 37) to distinguish *Bornstein* on the ground that the subcontractor in that case had falsely marked the tubes to make it appear that they satisfied the contract's specifications. See 423 U.S. at 307. *Bornstein* at least makes clear, however, that a "claim" can be "false or fraudulent" within the meaning of the FCA even if no explicit false statement appears on the request for payment itself. And the Court did not indicate that the result turned on the fact that the tubes were mismarked rather than simply substandard. The 1986 Senate Report cited *Bornstein* as an example of a case involving "claim[s] for goods or services * * * provided in violation of con-

tract terms, specification, statute or regulation." Senate Report 9.

4. Petitioner's narrow view of what constitutes a "false or fraudulent claim" is also fundamentally inconsistent with the mechanisms by which federal funds are often disbursed. Many government programs and contracts involve sequential steps. At the first step, by forming contracts with the government or establishing their eligibility to participate in federal programs, would-be recipients obtain initial access to a continuing stream of federal funds. Once initial eligibility to receive those funds has been established, contractors and program participants often submit periodic requests for payment, as goods are delivered or services performed, without being required to reaffirm their continued compliance with all relevant conditions. The recipient's continued compliance with those conditions, however, still lies at the heart of "what [the government] bargained for." *Wilkins*, 659 F.3d at 314 (citation omitted). When a claimant requests full payment for goods or services that it knows do not satisfy contractual or legal requirements, its claim is "false or fraudulent" even if the conditions it knowingly violates are set forth in documents separate from the payment request.

For example, in *Triple Canopy*, *supra*, the United States Army awarded a contract to a private contractor (Triple Canopy) for the provision of guard services at an overseas military base. 775 F.3d at 632. To win the contract, Triple Canopy promised to fulfill enumerated "responsibilities," including a requirement that its guards pass a basic marksmanship test. *Ibid.* Triple Canopy submitted monthly invoices for its guards for an entire year, ultimately receiving more

than $4.4 million, even though it knew that *none* of its guards had passed the test (despite a number of unsuccessful attempts). *Id.* at 632-633. Triple Canopy argued that it had not submitted a "false or fraudulent" claim because the invoices themselves did not expressly state that the marksmanship requirement had been satisfied. *Id.* at 634.

The court of appeals rejected that argument, recognizing that "the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements." *Triple Canopy*, 775 F.3d at 636 (internal quotation marks omitted); see *id.* at 638 (explaining that Triple Canopy had requested payment "for providing base security in an active combat zone" despite knowing that its "guards could not, for lack of a better term, shoot straight"). Particularly given the wide variety of governmental contracts, programs, and awards, FCA liability should not depend on whether the claim form itself reiterates all contractual and legal requirements. Instead, the Court should recognize that, when a claimant requests full payment from the government, despite "knowing" that it has violated "material" requirements, see 31 U.S.C. 3729(b)(1) and (b)(4), that claimant has submitted a "false or fraudulent claim."

B. Petitioner's Policy Arguments Provide No Sound Basis For Limiting The FCA Term "False Or Fraudulent Claim" To Payment Requests That Contain Explicit Falsehoods.

Petitioner offers an array of policy arguments (Br. 38-41) in support of its proposed narrow construction of the term "false or fraudulent claim." Even if those

arguments had greater practical force, they would provide no sound basis for exempting from the FCA's coverage a significant class of conduct that has traditionally been viewed as fraudulent. In any event, petitioner's arguments are unpersuasive even on their own terms.

Petitioner asserts (Br. 38-39) that allowing liability on the basis of implied misrepresentations "would drain almost all practical significance from the government's decision to require *express* certifications of compliance" on some payment requests. Petitioner also argues (Br. 39) that an express certification of compliance "provid[es] clear notice of the requirements for seeking payment from the government." In many instances, federal contracting officials may indeed conclude that requiring such certifications serves a useful purpose, *e.g.*, to remind the claimant of particular obligations or to memorialize the fact that particular conditions are material to the government's payment decision. In other circumstances, however, contracting officials may reasonably conclude that an effort to devise such certifications would be pointless, burdensome, or counter-productive.

Petitioner is relatively imprecise about the *type* of express-certification requirement that it believes would strike the appropriate balance between clear notice to claimants and preserving accountability for fraud against the federal fisc. Government contracting officials could require every claimant to certify in general terms that "all contractual and legal requirements have been satisfied"; but that approach would not meaningfully serve the notice function that petitioner highlights. At the other extreme, it would be burdensome and impractical for the government to

attempt to reproduce on every claim form or invoice the text of all applicable contractual and legal requirements.

Petitioner suggests (Br. 39) an intermediate approach, under which the government would mandate express certifications of compliance with some *subset* of the legal or contractual requirements that apply in a particular context. Petitioner identifies, as a purported advantage of that approach, that it would "allow[] program participants and contractors to focus their compliance efforts on those particular priority areas that the government has identified." *Ibid.* But recipients of federal funds are obligated to comply with *all* legal and contractual prerequisites, not simply those that the government has identified as "priority areas." The practical effect of petitioner's approach would be to give persons who request government funds advance notice of which contractual and legal requirements they can knowingly disregard without fear of FCA liability. Nothing in law or logic suggests that claimants are entitled to such notice.

Petitioner notes (Br. 39-40) that "[t]hose who do business with the government * * * face duties that are voluminous and sometimes difficult to decipher." But when the complexity of particular government funding programs gives rise to legitimate uncertainty as to a claimant's legal obligations, the FCA accommodates that concern by imposing liability only if the claimant acts "knowingly." 31 U.S.C. 3729(a)(1). In 1986, Congress added "deliberate ignorance" and "reckless disregard" to the FCA's definition of "knowingly," see 31 U.S.C. 3729(b)(1); note 4, *supra*, specifically to deal with "ostrich-like" government contractors who "refus[ed] to learn of information" that was

inconvenient. Senate Report 14-15. Although Congress did not want to "punish honest mistakes or incorrect claims submitted through mere negligence," it "recognize[d] that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate." *Id.* at 7. The Act's current provisions appropriately balance those goals.[6]

The question, moreover, is not simply whether close cases of ambiguous contractual or legal duties can be imagined, or what the result should be in such cases. Petitioner's proposed rule would preclude liability even when the claimant has *deliberately* violated a requirement that is indisputably *central* to the government's reasons for paying the claim—such as the marksmanship requirement at issue in *Triple Canopy*—so long as the claimant avoids discussing the issue when requesting payment. Nothing about that result would be fair.

II. A CLAIM FOR PAYMENT THAT IS INCONSISTENT WITH A CONTRACTUAL OR LEGAL REQUIREMENT MAY BE "FALSE OR FRAUDULENT" EVEN IF THE REQUIREMENT HAS NOT BEEN EXPLICITLY IDENTIFIED AS A CONDITION OF PAYMENT.

Petitioner contends in the alternative that, if an implied misrepresentation can *ever* give rise to FCA liability, it should have that effect only when "a defendant requests payment in violation of an expressly

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[6] Courts have declined to impose liability under the FCA on government contractors that relied in good faith on an objectively reasonable interpretation of a statute, regulation, or contractual provision. See, *e.g.*, *United States ex rel. Oliver* v. *Parsons Co.*, 195 F.3d 457, 464 (9th Cir. 1999), cert. denied, 530 U.S. 1228 (2000).

designated precondition of payment." Pet. Br. 41. That argument lacks merit. Under the FCA, as under the common law, liability for a deliberately misleading omission turns instead on whether the omission was material to the government's payment decision.

A. Even if petitioner's fallback approach were adopted, petitioner would not be entitled to dismissal of respondents' complaint. The court of appeals correctly explained that "the provisions at issue in this case clearly impose conditions of payment." Pet. App. 15. As petitioner acknowledges (Br. 9), Section 429.439 of the MassHealth regulations states that "[s]ervices provided by a satellite program are reimbursable only if the program meets the standards" described in the subsections of that provision. *Inter alia*, those subsections require the satellite facility to employ a clinical director who "meet[s] all of the requirements" listed in Section 429.423(B), 130 Mass. Code Regs. § 429.439(C), which include the proper "selection of clinical staff" and "supervision of staff performance." *Id.* § 429.423(B)(2)(a) and (c).

A separate regulation states that "MassHealth * * * pays for diagnostic and treatment services only when a professional staff member, as defined by [Section] 429.424, personally provides these services." 130 Mass. Code Regs. § 429.441(A). The definitional provision it cross-references, which is entitled "qualifications of professional staff members authorized to render billable mental health center services by core discipline," specifies requirements for various staff members, including the requirement of a board-certified psychiatrist. *Id.* § 429.424 (capitalization altered). The regulations thus state explicitly that mental health services are not reimbursable under

MassHealth unless they are provided in accordance with staffing and supervision requirements.

Petitioner argues (Br. 56-59) that Section 429.439 cannot serve as a predicate for liability under the FCA because it is not clear what conduct it requires, how it applies to petitioner's facilities, or whether respondents have adequately alleged that it was violated. Those arguments are relevant to the question whether petitioner violated Section 429.439, and thus to whether respondents can meet their ultimate burden of proof. And, to the extent that the regulation is ambiguous, that lack of clarity may bear on the determination whether petitioner acted "knowingly." See note 6, *supra*. But even if the substance of the regulatory requirements is to some extent ambiguous, the requirements are unambiguously couched as prerequisites to payment. As the court of appeals observed, any distinction between "condition[s] of payment" and other contractual or legal requirements therefore "is not relevant here." Pet. App. 15.

B. Petitioner contends (Br. 43) that, unless a particular legal or contractual requirement has been explicitly identified as a condition of payment, "there would be no logical basis to infer that, in submitting a claim for payment, the claimant impliedly represents that it has complied with that requirement." That is incorrect.

Because a request for payment implies that the claimant has complied with applicable requirements, the request is misleading if the claimant knows, but fails to disclose, that the government will "not get what it bargained for." *Wilkins*, 659 F.3d at 314 (citation omitted); see *Junius Constr.*, 178 N.E. at 674 (partial disclosure is "[m]isrepresentation" where

undisclosed facts "went to the very essence of the bargain"). Under common-law principles, liability for misleading omissions turns on "whether the person making the statement knows or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand." Restatement § 529 cmt. b, at 63. A similar approach to materiality is appropriate under the FCA.

Under the FCA, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. 3729(b)(4).[7] When a law or contract states explicitly that payment will be withheld if a particular requirement is not satisfied, the requirement is undoubtedly "material" under the FCA definition. It does not follow, however, that *only* requirements expressly designated as conditions of payment are material to the government's payment decision.

In *Triple Canopy*, *supra*, the requirement that Triple Canopy's guards pass a basic marksmanship test was designated in the contract as one of the contractor's "responsibilities," 775 F.3d at 632, but it was

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[7] Although two of the Act's prohibitions contain the word "material," see 31 U.S.C. 3729(a)(1)(B) and (G), Section 3729(a)(1)(A) does not, but instead imposes liability on any person who "knowingly presents * * * a false or fraudulent claim for payment or approval." The term "false or fraudulent claim," however, has historically been understood as limited to claims that are false or misleading in some *material* respect. Even an explicit false statement appearing on an invoice or claim form will not render the claim itself actionable if the statement has no logical bearing on the government's payment decision. That understanding is consistent with the FCA's common-law antecedents, and with this Court's recognition that "the common law could not have conceived of 'fraud' without proof of materiality." *Neder*, 527 U.S. at 22.

not identified as a condition of payment, see *id.* at 637 n.5. Yet there is no doubt that it was central to the government's reasons for hiring Triple Canopy and therefore "material" under the FCA. As the court there observed, "common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." *Id.* at 637-638. It would clearly disserve the Act's purposes to hold that Triple Canopy should escape FCA liability simply because its contract did not specify that non-compliance with the marksmanship requirement would lead the government to withhold payment. Cf. *SAIC*, 626 F.3d at 1269 ("So long as the government can show that supplying gasoline at the specified octane level was a material requirement of the contract, no one would doubt that the monthly invoice [seeking payment for gasoline below the prescribed octane level without disclosing the discrepancy] qualifies as a false claim under the FCA despite the fact that neither the contract nor the invoice expressly stated that monthly payments were conditioned on complying with the required octane level.").

Petitioner's argument also reflects a misunderstanding of the way that government programs work. That the government has not explicitly "conditioned payment on compliance" with a particular requirement (Pet. Br. 47), by threatening not to pay if the condition is violated, does not mean that the requirement is unimportant or peripheral to the government's objectives. Withholding payment is one of many tools that the government uses when a claimant has failed to live up to its end of the deal. The gov-

ernment often must decide whether to impose a lesser sanction, to renegotiate the deal, or to demand a different form of performance; and its choice of a response other than non-payment does not imply that the breached condition was unimportant. The government can choose knowledgeably among those options, however, only if the claimant admits its failure to satisfy a material requirement. By requesting payment without disclosing that a contractual or legal requirement has been violated, a claimant effectively disables the government from exercising that discretion.

C. Petitioner's other arguments are no more persuasive. Petitioner contends that advance designation of particular requirements as "conditions of payment" is necessary to give claimants "fair notice" (Br. 44) and prevent "unfair" imposition of treble damages and civil penalties (Br. 47). But the common-law rule that misleading material omissions may constitute actionable fraud has not depended on advance notice that particular omissions would be viewed as "material."

Similar arguments were made in *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), where the Court addressed whether a publicly traded company's SEC registration statement might be misleading because it included an opinion that implicitly "convey[ed] facts about how the speaker ha[d] formed the opinion." *Id.* at 1328. The defendant argued that asking whether a company has implicitly conveyed incorrect information by stating an opinion would be "hopelessly amorphous, threatening unpredictable and possibly massive liability." *Id.* at 1331 (internal quotation marks omitted). This Court disagreed, noting that

"courts have for decades engaged in just that inquiry, with no apparent trouble, in applying the common law of misrepresentation." *Id.* at 1332. The long common-law history of civil and criminal liability for fraudulent misrepresentations, see pp. 16-20, *supra*, also refutes petitioner's argument (Br. 44) that it would be "constitutionally suspect" for a recipient of government funds to be held liable for submitting a claim for payment despite "knowingly" violating a "material" requirement.

Finally, petitioner's concern (Br. 53-56) that "bounty hunters" will file meritless claims that threaten treble damages is simply a quarrel with the FCA's qui tam mechanism. Congress viewed "a coordinated effort of both the Government and the citizenry" as the appropriate response to "sophisticated and widespread fraud" by the recipients of federal funds. Senate Report 2. The Act authorizes the Attorney General to intervene in, take over, and dismiss FCA suits when appropriate, see 31 U.S.C. 3730(a) and (c), which provides a further safeguard against abusive litigation.

III. RESPONDENTS HAVE ADEQUATELY PLEADED THAT PETITIONER SUBMITTED FALSE OR FRAUDULENT CLAIMS.

In the present case, respondents pleaded that petitioner had requested payment from the government for providing mental health services at its Arbour facility despite knowing that it had failed to comply with a number of regulatory requirements. Respondents alleged that Arbour had not employed a board-certified psychiatrist, as required by Massachusetts law. Pet. App. 20; see 130 Mass. Code Regs. § 429.422(A); *id.* § 429.424(A)(1). Respondents also

alleged that Arbour had employed therapists who "were not licensed for independent practice" and other staff members who were "not * * * licensed as social workers or mental-health counselors." Pet. App. 23; see 130 Mass. Code Regs. § 429.424. And respondents alleged "[t]hat supervision at Arbour was either grossly inadequate or entirely lacking." Pet. App. 16; see 130 Mass. Code Regs. § 429.423(B).

Respondents' complaint thus alleged that, despite knowingly violating multiple regulatory requirements, petitioner had billed the government in full for services provided by its unlicensed and improperly supervised employees. If respondents can prove those allegations, and can show that the violated requirements were material (which is not directly disputed here), petitioner's requests for payment would be "false or fraudulent" under the FCA. Respondents therefore have "provided sufficient allegations of falsity to survive a motion to dismiss." Pet. App. 16; see *id.* at 17 n.14 ("[E]ach time it submitted a claim, Arbour implicitly communicated that it had conformed to the relevant program requirements, such that it was entitled to payment.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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